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IN THE

Supreme Court of the United States

October Term, 1953
No. 294

FRED J. HOWARTH,

Petitioner,

vs.

MAE K. HOWARTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

See 333 US 842 cert den. (was FFaC vacated ??)

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IN THE

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October Term, 1953
No. .....

FRED J. HOWARTH,

Petitioner,

vs.

MAE K. HOWARTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Fred J. Howarth for a writ of certiorari directed to the District Court of Appeal of the State of California, Second District, Division One, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This Petition Presents Facts Disclosing a Failure and Refusal by the State of California to Give Full Faith and Credit to a Final Judgment Duly Rendered and Existing in the State of Utah and That Thereby the Provisions of Article IV, Section 1, of the Constitution of the United States Have Been Violated.

Respondent brought an action to recover $6,615.00 alleged to be due under a "Property Settlement and Separation Agreement." Her complaint was entitled "First Amended Complaint for Money Due under the Terms of Written Contract." [R. 17.]

The evidence at the trial disclosed: That on July 3, 1941, respondent and your petitioner were husband and wife [R. 84]; that said agreement contained recitals that they were then living apart, that they were "mutually desirous of effecting a property settlement and separation agreement" [R. 64]; that said agreement, after making provisions for the "custody and control" of the minor children of the parties [R. 66] and for their education and support [R. 67], set forth a covenant in Paragraph "12" thereof whereby petitioner agreed to pay the sum of $35.00 weekly to respondent [R. 67], which was followed by an express declaration that *"The weekly payments provided by paragraph 12 are for the support of the wife"* (emphasis added) [R. 68] and that they were "not . . . assignable" by her [R. 68]; that other paragraphs provided that said payments were to be made during the life of the wife, if she did not remarry [R. 67], and that the husband's estate would be liable for such payments after his death if she remained unmarried [R. 68]; that subsequently, and on June 2, 1943, your petitioner was awarded an interlocutory decree of divorce in the District Court of the Third Judicial District, Toole County, Utah [R. 60-63], which decree became final six months thereafter [R. 61]; that a copy of said "Property Settlement and Separation Agreement" had been attached to petitioner's complaint in said action and by reference made "a part of . . . (said) complaint" [R. 91-92]; that respondent entered her written appearance in said action. whereby she admitted service of said complaint upon her and waived time to answer and consented to the matter being heard as a default. [R. 91-92.]

The evidence further disclosed that the said interlocutory decree, after awarding a divorce to petitioner subject

to the provisions of the Utah statute as not being final and absolute until six months later, concluded with the following recital:

> "2. That the property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto relative to their property is hereby confirmed and approved." [R. 61.]

At all times during the trial petitioner objected that the court lacked jurisdiction of your petitioner and of the cause of action [R. 93-104, 110] as the contract under which recovery of the support payments was sought had been incorporated in the Utah decree and had merged therein and that the contract had become superseded by the decree and that the sole obligations of petitioner thereafter imposed were not those imposed by contract but were those imposed by decree and that the sole remedy of respondent was obtainable only through an action brought on the Utah decree. [R. 93-104.]

The trial court overruled the contentions of your petitioner and then proceeded to interpret and construe the decree of the Utah court in accordance with the laws of California and in error then concluded that the entry of judgment upon the property settlement and separation agreement sued upon, rather than upon the Utah judgment, was proper and did not violate the Full Faith and Credit Clause of the Federal Constitution. [R. 110.]

Judgment was entered in the sum of $6,615.00 in favor of respondent and against your petitioner. [R. 45-46.]

Your petitioner appealed from the judgment of the trial court to the District Court of Appeal, Second District, State of California, which court, on the 4th day of Feb-

ruary, 1953, rendered its decision affirming the judgment of the trial court. [R. 128-130.] That thereafter, and within the time provided under the laws of the State of California, your petitioner filed his petition in the Supreme Court of the State of California, praying that a hearing be granted in said court after the decision of the said District Court of Appeal, which petition was denied by said Supreme Court on the 2nd day of April, 1953. [R. 131.]

Although the question was directly placed before it by petitioner upon his appeal to the District Court of Appeal, that court refused to rule as to whether the trial court failed to give to the decree of the Utah court the full faith and credit to which it was entitled and has thereby violated the Constitution of the United States.

In its opinion, the District Court of Appeal refers to its earlier decision in *Howarth v. Howarth* (1947), 81 Cal. App. 2d 266, 183 P. 2d 670, and bases its refusal to pass upon the question squarely presented, as to whether the trial court here failed to give full faith and credit to the Utah judgment, upon the following erroneous recitals:

> 1. "an examination of the previous opinion of this court and appellant's brief herein, discloses that appellant's attack upon the judgment appealed from is based upon the identical grounds assigned upon his appeal from the judgment in the previous action, and all of which are decided adversely to him by the court." [R. 128.]
>
> 2. ". . . appellant's primary contention is that the agreement sued upon was incorporated and merged in the decree granted by the District Court in and for Tooele County, Utah, in the divorce action be-

tween the parties, and as corollary thereto (a) that the payments under said agreement were in the nature of alimony and hence subject to modification by the Utah court, and (b) *any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the federal Constitution.* In the previous action between the parties heretofore adverted to, the Superior Court in and for the County of Los Angeles decided each of these contentions adversely to appellant, and as stated, upon appeal this judgment was affirmed. Hence appellant is estopped from relitigating the same questions in the instant proceeding." (Emphasis added.) [R. 128-129.]

Ignored by the District Court of Appeal is the fact that the rights of petitioner under the Full Faith and Credit Clause of the Federal Constitution were never put in issue in the first *Howarth* case and were never considered nor passed upon by either the said Superior Court or by the District Court of Appeal. The only reference to the Federal Constitution in the earlier case was when petitioner, for the first time in the case, asserted upon appeal his rights under the Fourteenth Amendment to the Constitution of the United States.

And, as shown by the opinion of the District Court of Appeal, no other rights under the Federal Constitution were considered or passed upon. We quote as follows:

"Appellant's contention that he may not be deprived of his right to have the support provisions of the Utah court decree modified without denying to him the rights guaranteed him by the provisions of section 13, Article I of the Constitution of the State of California *and by subdivision 1 of the Fourteenth*

Amendment to the Constitution of the United States cannot be sustained." (Emphasis added.)

Howarth v. Howarth (1947), 81 Cal. App. 2d 266, 183 P. 2d 670.

Here, at the outset, petitioner raised in the trial court the question of his rights under the Full Faith and Credit Clause of the Federal Constitution. This was done by demurrer to plaintiff's complaint and by demurrer to plaintiff's first amended complaint. [R. 5-8, 10-15, 29-34.]

Petitioner, by said demurrers, not only asserted his rights under the Constitution and Laws of Utah as to modification of the support provisions of the Utah judgment, but also insisted that the action brought in California, not upon the Utah judgment but upon the property settlement agreement which, under Utah law, had become merged in said judgment and had no longer an independent existence, could not be sustained as

". . . any judgment rendered (herein) attempting to do so will violate the provisions of Article IV, section 1, of the Constitution of the United States. . . ." [R. 12.]

Petitioner's demurrer having been overruled, he filed his answer to plaintiff's first amended complaint, wherein he expressly alleged that, it being conceded by all parties that the Utah court had jurisdiction of the parties and the subject matter

". . . neither the courts of California, nor of any other State of the United States, may impeach the said Utah decree, nor determine, under the law of the forum, the construction or effect of the said Utah decree, nor impair its integrity by failing to give it

full faith and credit, without violating the provisions of Article IV, section 1, of the Constitution of the United States." [R. 37, 39, 40.]

Throughout the trial in the Superior Court, petitioner continued to assert his said rights.

The attention of the District Court of Appeal, in petitioner's opening brief in the present case, was expressly directed to the fact that following the trial, the trial court made its written findings of fact and conclusions of law which included the following:

> *"That throughout the proceeding in the above entitled Court the defendant has tendered for decision his rights under the Federal Constitution and Laws and under the Constitution and laws of the State of Utah and under the Constitution and laws of the State of California, and they have been duly considered by the above entitled Court and decided adversely to the contentions of said defendant."* (Emphasis added.) [R. 110.]

Notwithstanding the fact that, as so stated by the trial court, it did consider the rights tendered for decision under the Full Faith and Credit Clause of the Federal Constitution, and had decided "adversely" to the contentions of petitioner, the District Court of Appeal refused to consider upon appeal, or to rule upon the question squarely before it, namely, whether the trial court had denied the full faith and credit to which the Utah judgment was entitled under the rule laid down in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190.

As hereinbefore stated, petitioner made no attempt to have his rights under the Full Faith and Credit Clause of the Federal Constitution determined by either the trial court or the District Court of Appeal in said earlier case.

Notwithstanding that such question was neither presented nor passed upon by either of said courts, petitioner for the first time in said earlier case attempted to raise such question by petition to the California Supreme Court for a hearing, which was denied by a divided court, and by subsequent petition to this Honorable Court for a writ of certiorari, which was denied. (333 U. S. 842, 92 L. Ed. 1126.)

Petitioner's Contention.

That the decision of the District Court of Appeal, refusing to consider and rule upon the question as to whether the trial court violated the Full Faith and Credit Clause of the Federal Constitution by construing the decree of divorce, granted to petitioner in the State of Utah, contrary to the express provisions of the laws of Utah constitutes in itself a violation of the Federal Constitution. Petitioner contends that he has thereby been deprived of the right to have the support provisions of the Utah decree modified from time to time, as provided by Section 1212, Comp. Laws, 1907, of the State of Utah, thus denying to him rights guaranteed him by the Constitution and laws of the State of Utah.

Respondent's Contentions.

Respondent contends that, notwithstanding the rule laid down by this Honorable Court in *Union National Bank v. Lamb*, 337 U. S. 38, 93 L. Ed. 1190, that neither the trial court nor the District Court of Appeal has violated the provisions of Article IV, Section 1, of the Constitution of the United States.

B.

Basis of Jurisdiction of the United States Supreme Court to Review the Judgment.

1. Statutory Provisions.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Sections 1254 and 1257, and Section 237(b) of the Judicial Code (28 U. S. C. A., Sec. 344(b)).

2. Date of Judgment.

The decision of the said District Court of Appeal sought to be reviewed was rendered on the 4th day of February, 1953. Within the time allowed by the "Rules on Appeal," adoptel by the Judicial Council of the State of California on March 30, 1943, your petitioner filed a petition for a hearing in the Supreme Court of the State of California, which petition was considered by that court and was denied on the 2nd day of April, 1953. The judgment then became final. A petition for a writ of certiorari presented to this Honorable Court within three months thereafter, or within such extension as may be granted under 28 United States Code, Sections 1254 and 1257, is in time. By order signed by Mr. Justice Tom C. Clark, dated June 24, 1953, the time for filing this petition was extended to and including August 29, 1953.

American Ry. Express Co. v. Levee, 265 U. S. 19, 21, 68 L. Ed. 140.

3. Cases Believed to Sustain the Jurisdiction of the Supreme Court of the United States.

I.

THE REFUSAL OF THE CALIFORNIA DISTRICT COURT OF APPEAL TO CONSIDER AND PASS UPON THE QUESTION SQUARELY PRESENTED TO IT, WHETHER THE TRIAL COURT HAD FAILED TO GIVE FULL FAITH AND CREDIT TO THE JUDGMENT OF THE UTAH COURT, IS A RULING UPON A FEDERAL RIGHT SUBJECT TO REVIEW BY THIS COURT.

"The refusal of the Tennessee Supreme Court to give credit to that judgment because of its nature is a ruling upon a federal right and the sufficiency of the grounds of denial is for this court to decide. *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 431, 88 L. Ed. 149, 157, 64 S. Ct. 208, 150 A. L. R. 413, and cases cited."

Barber v. Barber, 323 U. S. 77, 89 L. Ed. 82.

II.

THE UNITED STATES SUPREME COURT IS THE FINAL ARBITER OF QUESTIONS ARISING UNDER THE FULL FAITH AND CREDIT CLAUSE.

Union National Bank v. Lamb, 337 U. S. 38, 93 L. Ed. 1190;

Williams v. North Carolina, 317 U. S. 287, 302.

III.

THE SUPREME COURT OF THE STATE OF CALIFORNIA HAVING REFUSED TO GRANT A HEARING THEREIN, THE JUDGMENT OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IS A FINAL JUDGMENT.

The existence of jurisdiction is to be tested by the substantial operation of the judgment.

United States v. Thompson, 251 U. S. 407, 412, 64 L. Ed. 333, 341.

4. Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

I.

At the outset, your petitioner desires to direct the attention of this Honorable Court to the fact that the questions presented herein are of nationwide importance and are very similar in certain aspects to one or more of the questions presented in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190, and in *First National Bank of Chicago v. United Air Lines, Inc.,* 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441.

In the *Union National Bank* case, the Supreme Court of Missouri, on June 12, 1948, construed a Colorado judgment by applying Missouri law. As to the appellant's contention that the Full Faith and Credit Clause was thereby violated, it said:

> "In other words, a foreign judgment, original or revived, has the same standing in Missouri, no better, no worse, than a domestic judgment. *This does not run counter to the full faith and credit provision of the federal constitution,* because, as we have seen, the enforcement of a foreign judgment goes to the remedy only and that is a matter for the law of the forum." (Emphasis added.)
>
> *Union National Bank v. Lamb,* 338 Mo. 65, 213 S. W. 2d 416.

This solemn pronouncement by a unanimous state court was set aside *in toto* by a unanimous decision of this Honorable Court. . . .

> *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190, 69 S. Ct. 491.

This case presents a question of fundamental importance under the Full Faith and Credit Clause in reference to the judgment of one state, predicated upon a contract between husband and wife concerning "payments for the support of the wife," and the construction and interpretation of said judgment by the courts of a sister state, which construction and interpretation were based upon its laws and not upon the laws of the state rendering the judgment.

There is no question here as to the validity of the Utah judgment as both petitioner and respondent have at all times proclaimed its validity. The court had personal jurisdiction over both parties and therefore had the power to enter a valid personal judgment.

Noyer v. Neff, 95 U. S. 714.

The action of the California courts here, if allowed to stand, would establish a precedent whereby all courts in all states could circumvent the operation of the Full Faith and Credit Clause by simply stating that

> "we refuse to consider and rule upon the question presented, as to whether the trial court failed to give Full Faith and Credit to the judgment of the sister state, even though the trial court expressly considered such question and ruled thereon adversely to appellant."

Where, as here, the sole authority relied upon by the appellate court for such failure and refusal is reference to an earlier decision, where no question under the Full Faith and Credit Clause was ever presented, considered or passed upon, then we have reached a situation where any state court may disregard the provisions of the Federal

Constitution by saying, as was done by Missouri in the *Lamb* case: "It is a question of enforcement of a foreign judgment and we will construe it in accordance with the law of the forum," or, as here, by simply stating that the question presented under the Federal Constitution just will not be considered.

The extreme danger of any such precedent is apparent here, for your petitioner is protected under the Constitution and laws of the State of Utah, and particularly by the provisions of Section 1212, Comp. Laws 1907, of that state, if all states are required to give full faith and credit to the judgment rendered by Utah in his favor in this, that from time to time, as circumstances or conditions warrant it, he may appear before the courts of that state and seek modification of the support provisions embodied in the divorce decree, as provided by its laws; whereas, this right has been completely and effectively and finally, except for the intervention of this Honorable Court, denied him by the courts of California in construing said decree in accordance with its laws, which are not in accord with the laws of Utah as to the merging of a property settlement and support agreement in a judgment. California, by *stare decisis* only, insists that the language used in the judgment must be sufficient to sustain a contempt of court proceeding against the party failing to perform thereunder. Utah has no such requirement.

II.

This Honorable Court has been called upon, heretofore, to consider a similar failure of the courts of California to grant full faith and credit to the decree of a sister state in a separate maintenance action and, finding the question substantial, this Honorable Court assumed jurisdiction and

disposed of the main contention of the Supreme Court of California by the following statement:

> "But conceding without deciding that the California law is as asserted the proposition of fact upon which the argument rests *amounts simply to denying all effect to the Illinois decree.*" (Emphasis added.)
>
> *Harding v. Harding,* 198 U. S. 317, 49 L. Ed. 1076.

III.

Found substantial also by this Honorable Court were the questions presented in *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, where the appellant successfully contended that the failure of the courts of Nebraska to observe that "the findings and decree" of the courts of Arkansas, in reference to alimony, constituted a denial to him of rights guaranteed under the Constitution of the United States.

IV.

Noted as substantial, also, were the similar questions presented in *Davis v. Davis,* 305 U. S. 32, 83 L. Ed. 26, where this Honorable Court declared that each state is required to give, not some, but full faith and credit to judicial proceedings of other states.

V.

The questions presented must be regarded, too, as being substantial when viewed in the light of the rule stated by this Honorable Court in *Williams v. North Carolina,* 325 U. S. 226, 228, 89 L. Ed. 1577, 1581:

> "In short the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill defined concept of comity."

The failure of the courts of California to observe that it was declared in that case that the correct procedure under the Constitution, for the collection or enforcement of a judgment recovered in another state, was to first sue on it and recover a judgment on it; not only presents a substantial question but invites the supervision of this Honorable Court.

VI.

Unless this Honorable Court can say that every question presented has been foreclosed by prior decisions and are clearly not debatable, it cannot be said that no question of substance is presented here.

Chesbro v. Los Angeles County Flood Control District, 306 U. S. 459, 463;

Hamilton v. University of California, 293 U. S. 245, 258.

5. Stage in Proceedings and Method of Raising Federal Question.

Here, at the outset, petitioner raised in the trial court the question of his rights under the Full Faith and Credit Clause of the Federal Constitution. This was done by demurrer to plaintiff's complaint and by demurrer to plaintiff's first amended complaint. [R. 5-8, 10-15, 29-34.]

Petitioner, by said demurrers, not only asserted his rights under the Constitution and Laws of Utah as to modification of the support provisions of the Utah judgment, but also insisted that the action brought in California, not upon the Utah judgment but upon the property settlement agreement which, under Utah law, had become merged in said judgment and had no longer an independent

existence, could not be sustained as ". . . any judgment rendered (herein) attempting to do so will violate the provisions of Article IV, section 1, of the Constitution of the United States. . . ." [R. 12.]

Petitioner's demurrer having been overruled, he filed his answer to plaintiff's first amended complaint, wherein he expressly alleged that, it being conceded by all parties that the Utah court had jurisdiction of the parties and the subject matter

> ". . . neither the courts of California, nor of any other State of the United States, may impeach the said Utah decree, nor determine, under the law of the forum, the construction or effect of the said Utah decree, nor impair its integrity by failing to give it full faith and credit, without violating the provisions of Article IV, section 1, of the Constitution of the United States." [R. 37, 39, 40.]

Throughout the trial in the Superior Court, petitioner continued to assert his said rights.

The attention of the District Court of Appeal, in petitioner's opening brief in the present case, was expressly directed to the fact that following the trial, the trial court made its written findings of fact and conclusions of law which included the following:

> *"That throughout the proceeding in the above entitled Court the defendant has tendered for decision his rights under the Federal Constitution and Laws and under the Constitution and laws of the State of Utah and under the Constitution and laws of the*

State of California, and they have been duly considered by the above entitled Court and decided adversely to the contentions of said defendant." (Emphasis added.) [R. 110.]

The decision of the District Court of Appeal noted that

". . . appellant's primary contention is that the agreement sued upon was incorporated and merged in the decree granted by the District Court in and for Tooele County, Utah, . . . and (b) any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the federal Constitution." [R. 129.]

Actually, the action was brought upon the agreement and not upon the Utah judgment. [R. 17-27.]

Petitioner's petition to the California Supreme Court contained, under the heading "Point Seven," the following:

"The final decree of divorce described in plaintiff's complaint is entitled, pursuant to the provisions of Article IV, Section 1, of the Constitution of the United States, to Full Faith and Credit by the Courts of California and the rights and interests adjudicated thereby may not be subjected to the scrutiny of the courts of any sister state." [R. 120.]

Citing *Sherrer v. Sherrer,* 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1055.

C.

The Questions Presented.

1. It being conceded that there is no question here of the validity of the divorce decree of the Utah court, may the courts of California refuse to give full faith and credit, as required by the provisions of Article IV, Section 1, of the Constitution of the United States, to that decree because the trial court construed the judgment in accordance with the laws of the forum and the District Court of Appeal failed and refused to consider and pass upon the question presented under the Federal Constitution? [R. 110-129.]

2. May the court of California construe the divorce decree of the Utah court in accordance with California law, established by *stare decisis* only, that a property settlement and support agreement is not made part of a divorce decree and does not merge therein unless the language used by the court is sufficient to sustain a contempt of court citation in the event of default by any party thereto, in the light of the fact that Utah has no such requirement; without violating the provisions of the Full Faith and Credit Clause of the Constitution of the United States?

3. May the courts of California so hold, without violating said clause, particularly when considered in the light of the fact that the Supreme Court of Utah, relying on *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, and other decisions cited, has held, in *Smith v. Smith,* 77 Utah 60, 66,

> ". . . that the final judgment in an action granting a divorce settles all property rights of the parties, *and is a bar to action afterwards by either of the*

parties to determine the question of alimony or any property rights which might have been settled by such judgment" (emphasis added);

and has held in *Beesley v. Badger, et al.*, 66 Utah 194, 199, that past due and unpaid installments of alimony described in a decree for alimony

". . . stand(s) upon the same footing as ordinary money judgment and *may be enforced by execution in the same manner that ordinary judgments may be enforced"?* (Emphasis added.)

4. Did the District Court of Appeal of the State of California err in expressly holding that the contention of your petitioner that the judgment of the trial court denied rights existing in him, under the Constitution and Laws of the State of Utah, and particularly under the provisions of Section 1212, Comp. Laws 1907, of that state, to appear before the courts of that state, as circumstances required it, and seek modification of the support payments embodied in the divorce decree, and that thereby the Full Faith and Credit Clause of the Federal Constitution was violated, was a question that would not be considered by it?

5. May under the Full Faith and Credit Clause, the question whether a property settlement and separation agreement was made a part of a Utah divorce decree by language sufficient to effect a merger be determined by California under the law of the forum?

D.

Reasons Relied on for the Granting of the Writ.

I.

The District Court of Appeal of the State of California, in failing to consider and pass upon the question under the Full Faith and Credit Clause of the Constitution of the United States, has decided a federal question of substance which is of nationwide importance in this, that it concerns the effect of agreements between husband and wife in reference to their property, and of a division thereof, and of separation agreements containing provisions "for the support of the wife," when such agreements are presented by the parties thereto to a court of competent jurisdiction; which court proceeds to determine rights thereunder and then causes the result thereof to be embodied in a decree of divorce, which decree, after becoming final, is duly presented in the courts of a sister state as a bar, under the Constitution of the United States, to an attempted relitigation of matters expressly determined in the decree of the other state.

II.

This Honorable Court granted certiorari in the matter entitled *Union National Bank v. Lamb,* 358 Mo. 65, 213 S. W. 2d 416, after its attention was directed to the fact that there, as here, the state court was of the opinion that it was mandatory that the foreign judgment conform to its laws; that the law of the forum was controlling as to such judgment and that such holding ". . . did not run counter to the full faith and credit provision of the federal Constitution."

In reversing, this Honorable Court said:

> ". . . *that the state of the forum could not defeat the foreign judgment because it was obtained by a procedure hostile to or inconsistent with that of the forum or because it was based on a cause of action which the forum would not have recognized.* . . . It is when a clash of policies between two states emerges that the need of the clause is the greatest." (Emphasis added.)

Union National Bank v. Lamb, 337 U. S. 38, 93 L. Ed. 1190.

III.

The decision asked to be reviewed here is contrary to the decisions of this Honorable Court in the following cases:

Union National Bank v. Lamb, 337 U. S. 38, 93 L. Ed. 1190;

Bates v. Bodie, 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444;

Morris v. Jones, 91 L. Ed. 488, 329 U. S. 545;

Williams v. North Carolina, 317 U. S. 287, 87 L. Ed. 278;

Johnson v. Muelberger, 340 U. S. 581, 95 L. Ed. 552;

Hughes, etc. v. Fetter, et al., 341 U. S. 609, 95 L. Ed. 1212;

Harris v. Commissioner, 340 U. S. 106, 95 L. Ed. 111;

Bank of Chicago v. United Air Lines, Inc., 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441.

Relying upon *Bates v. Bodie,* 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444, and other cases cited, the Supreme Court of Utah has applied this rule in *Smith v. Smith,* 70 Utah 60, 66, in determining whether a decree of divorce constituted a bar to a subsequent attempt to collect alimony. We quote from page 66 as follows:

> "In *Roe v. Roe,* 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367, it is said that the final judgment in an action granting a divorce settles all property rights of the parties, and is a bar to action afterwards brought by either of the parties to determine the question of alimony or any property rights which might have been settled by such judgment. To the same effect are the following: *Muckenberg v. Holler,* 29 Ind. 139, 92 Am. Dec. 345; *Behrley v. Behrley,* 93 Ind. 255; *Hardin v. Hardin,* 38 Texas 617; *Taylor v. Taylor,* 54 Ore. 560, 103 Pac. 525; *Bates v. Bodie,* 245 U. S. 520, 38 S. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C 355; *Allen v. Allen,* 159 Cal. 197, 113 Pac. 160; *Barnett v. Barnett,* 9 N. B. M. 205, 50 P. 337."
>
> *Smith v. Smith,* 77 Utah 60, 66.

IV.

The California court has failed to note that it has been said that courts cannot alter, amend or repeal judicial proceedings of another state without violating the Full Faith and Credit Clause of the Federal Constitution.

Dry v. Rice, 147 Va. 331, 137 S. E. 473.

It has also been held that courts should not determine what part of a judgment of a court of another state will be effective and what part not; if such a judgment is regu-

lar on the face of the record, it must be given full effect in all its terms. (*Caruthers v. Corbin,* 38 Ga. 75.) This rule has been expressly violated by the court below, as has been heretofore shown.

This Honorable Court has held that upon the determination of a controversy in accordance with the laws of another state, it is required that full faith and credit be given to the judgment of that state construing its own laws. (*Sovereign Camp W. O. W. v. Bolin,* 305 U. S. 66, 83 L. Ed. 45.) Utah has expressly recognized that rule in *Lawson v. Woodmen of the World,* 88 Utah 267, 53 P. 2d 432. The California court has, however, failed to recognize that rule here and has, on the contrary, construed the judgment of the Utah court in accordance with California law and expressly contrary to the laws of Utah as existing and as declared by its Supreme Court.

The construction and interpretation of a judgment are governed by the law of the state where it was rendered.

In re National Surety Co., 284 N. Y. 593, *cert. den.;*

Laughlin v. Pink, 311 U. S. 707, 85 L. Ed. 459;

Shreve Furniture Co. v. Manufacturers Assn., 168 Ark. 756, 271 S. W. 954;

Union Fire Ins. Co. v. Hansen, 237 Mo. App. 1110, 180 S. W. 2d 265;

Swift & Co. v. Boston & M. R. R., 82 N. H. 170, 131 Atl. 441.

Conclusion.

Your petitioner presents here highly important problems in reference to property rights and the right of maintenance arising out of the marriage relation, as well as important questions affecting all states in reference to what sort of full faith and credit shall, under the Constitution of the United States, be given decrees of sister states dealing with such matters, and presents the important question of the right of the highest appellate courts of a state to refuse to consider and pass upon the question whether a trial court has, by judgment rendered, denied full faith and credit to a judgment of a sister state, particularly where, as here, the trial court not only had such question presented to it but has certified that it considered it and ruled upon it adversely to the contention of the party asserting rights thereunder.

The question may also arise as to whether there exists an ever-growing tendency for the courts of the greater and more populous states to ignore the judgments of the courts of the smaller states and, if so, if the time has not arrived to curb such tendency.

Petitioner prays that his petition for a writ of certiorari be granted and that the judgment below be reversed.

Respectfully submitted,

LAWRENCE M. CAHILL,

EDITH C. CAHILL,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

FRED J. HOWARTH,

Petitioner,

vs.

MAE K. HOWARTH,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Your petitioner respectfully presents this brief in support of this petition for a writ of certiorari directed to the District Court of Appeal of the State of California, Second Appellate District, Division One, to review the judgment of that court rendered in the case entitled "Fred J. Howarth vs. Mae K. Howarth."

Opinions of the Court Below.

The opinion of said District Court of Appeal is reported in 115 Advance California Appellate Reports at page 879.

Grounds of Jurisdiction.

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Sections 1254 and 1257, and Section 237(b) of the Judicial Code (28 U. S. C. A., Sec. 344(b)). The decision of the said District Court

of Appeal sought to be reviewed was rendered on the 4th day of February, 1953 [R. 128]. Within the time allowed by the Rules on Appeal," adopted by the Judicial Council of the State of California on March 30, 1943, your petitioner filed a petition for a hearing in the Supreme Court of the State of California, which petition was considered by that Court and was denied on the 2nd day of April, 1953 [R. 131]. The judgment then became final. A petition for a writ of certiorari presented to this Honorable Court within three months thereafter, or within such extension as may be granted under 28 United States Code, Sections 1254 and 1257, is in time. By order signed by Mr. Justice Tom C. Clark, dated June 24, 1953, the time for filing this petition was extended to and including August 29, 1953.

American Ry. Express Co. v. Levee, 265 U. S. 19, 21, 68 L. Ed. 140.

Statement of the Case.

A complete statement of the case has been made in the petition under the headings: "Summary Statement of the Matter Involved" (p. 1); "Petitioner's Contentions" (p. 8); "Respondent's Contentions" (p. 8). Therefore, in the interest of brevity and because of the fact the petition and this brief are to be bound under a single cover, the facts of the case will not be repeated here other than the following brief recital:

This case involves the denial by the courts of the State of California, including its highest court, of the Full Faith and Credit to which a final judgment of the courts of the State of Utah is entitled under the provisions of Article IV, Section 1, of the Constitution of the United States and 28 U. S. C., Section 1738. The judgment

of the Utah court was entered in an action where the above named petitioner and the above named respondent were both before said court in person or by appearance in writing.

The California court has, contrary to the rule laid down in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190, construed the judgment rendered by the Utah court under the laws of California and has refused to apply the laws of Utah. Petitioner above named contends that the United States Constitution was violated by the California courts in holding that a written contract, entitled "Property Settlement Agreement," which was received by the Utah court and embodied, by appropriate language, in its judgment and merged therein in accordance with the Constitution and Laws of Utah, did not merge therein but continued to maintain an independent existence, sustaining an action for a money judgment thereon.

In so deciding, California has, as Missouri did as ruled upon in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 1190, relied entirely on the laws of the forum. One of the principal differences between the laws of California and Utah, as to the construction of a judgment of divorce embodying a property settlement agreement, is the California rule established by *stare decisis* that there is no merger unless the language used in the judgment is sufficient to sustain a contempt citation against either party, after judgment, failing to comply with the executory parts of the embodied contract. Utah, however, has no such rule or law.

The federal question was raised by the above named petitioner at the outset of the litigation by demurrer filed in the trial court and, following the trial, the trial court

made and filed its written findings of fact, including the following [R. 110]:

> "That throughout the proceeding in the above entitled court the defendant had tendered for decision his rights under the Federal Constitution and laws, and under the Constitution and Laws of the State of Utah and under the Constitution and Laws of the State of California, and they have been duly considered by the above entitled Court and decided adversely to the contentions of said defendant."

The facts presented also disclose a denial by the California court of the right existing in petitioner, under the Constitution and Laws of Utah and particularly under the provisions of Section 1212, Comp. Laws 1907, to appear before the courts of Utah and ask that they modify the support provisions in the divorce decree granted to him, which right has been expressly declared to exist, by the Supreme Court of that State, in *Bazzo v. Bazzo,* 425 Utah 625; and it has been held in *Barraclough v. Barraclough,* 100 Utah 196, that the courts do not lose the power to modify their decrees if the court adopts the suggestions of the parties to a divorce action regarding alimony.

Your petitioner contends that either the denial of such rights or the rendering of them ineffective by the California court constitutes not only a violation of the provisions of Article IV, Section 1, of the Constitution of the United States, but also a denial of rights guaranteed by the provisions of subdivision 1 of the Fourteenth Amendment to the Constitution of the United States.

Specifications of Error.

The court below erred:

1. In applying California law in construing a judgment of Utah;

2. In failing to give full faith and credit to the Utah decree;

3. In holding that petitioner's contention that ". . . any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the Federal Constitution," could not be considered because "in the previous action between the parties . . . the Superior Court . . . decided each of these contentions adversely to appellant, and as stated upon appeal this judgment was affirmed," and that petitioner was "estopped" [R. 129], whereas no such question under the Full Faith and Credit Clause was ever presented to or ruled upon by said Superior Court [R. 129];

4. In holding that a previous decision, which declared that the Utah decree was not a bar to the recovery by respondent of a money judgment under the terms of the "Property Settlement and Separation Agreement," precluded it from determining whether the Full Faith and Credit Clause had been violated" [R. 129];

5. In holding that your petitioner's contention that he may not be deprived of the right to have the support provisions of the decree of the Utah

court modified as provided by the Constitution and Laws of the State of Utah, without denying to him rights guaranteed to him under the Constitution of the United States, as well as under the Constitution of the State of California could not be considered and that petitioner was "estopped" [R. 129], because of the effect of an earlier judgment in a case (*Howarth v. Howarth,* 81 Cal. App. 2d 266) where no attempt was made by petitioner to raise any question under the Full Faith and Credit Clause of the Federal Constitution and the opinion of the District Court of appeal therein clearly discloses that such question was not presented nor passed upon;

6. In failing to find that the Utah decree was *res judicata* and entitled to full faith and credit as to all of the following:

a. The termination of the marriage relation,

b. The division of the property,

c. The custody of the minor child,

d. Payments for the support of the wife;

7. In affirming the judgment of the Superior Court of the State of California in and for the County of Los Angeles.

Summary of the Argument.

Point One.

THE CALIFORNIA COURT HAS FAILED AND REFUSED TO RULE AS TO WHETHER THE TRIAL COURT HAS FAILED TO GIVE TO THE DECREE OF THE UTAH COURT THE DUE FAITH AND CREDIT TO WHICH IT IS ENTITLED AND HAS THEREBY VIOLATED THE CONSTITUTION OF THE UNITED STATES.

Point Two.

THE FULL FAITH AND CREDIT CLAUSE REQUIRES THE JUDGMENTS OF THE COURTS OF ONE STATE BE GIVEN THE SAME FULL FAITH AND CREDIT IN SISTER STATES AS THEY HAVE BY LAW OR USAGE IN THE STATE GRANTING THE JUDGMENT, AND THIS REQUIREMENT MAY NOT BE EVADED BY POINTING TO A PREVIOUS JUDGMENT WHERE THE QUESTION OF RIGHTS UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION WAS NEITHER PRESENTED NOR CONSIDERED.

Point Three.

THE CALIFORNIA DISTRICT COURT OF APPEAL HAS ERRONEOUSLY HELD THAT PETITIONER'S CONTENTION THAT ". . . ANY ATTEMPT BY A CALIFORNIA COURT TO ENFORCE PAYMENT THEREOF CONSTITUTES A VIOLATION OF THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION," COULD NOT BE CONSIDERED AND THAT PETITIONER WAS "ESTOPPED" [R. 129] TO HAVE IT CONSIDERED BECAUSE "IN THE PREVIOUS ACTION BETWEEN THE PARTIES . . . THE SUPERIOR COURT . . . DECIDED EACH OF THESE CONTENTIONS ADVERSELY TO APPELLANT, AND AS

STATED UPON APPEAL THIS JUDGMENT WAS AFFIRMED," WHEREAS NO SUCH QUESTION UNDER THE FULL FAITH AND CREDIT CLAUSE WAS EVER PRESENTED TO OR RULED UPON BY SAID SUPERIOR COURT IN SAID PREVIOUS ACTION.

Point Four.

CLAIMS UNDER THE "PROPERTY SETTLEMENT AND SEPARATION AGREEMENT" MAY NOT BE RELITIGATED IN CALIFORNIA WITHOUT VIOLATING THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

Point Five.

THE "PROPERTY SETTLEMENT AND SEPARATION AGREEMENT" MERGED IN THE UTAH DECREE AND ALL CLAIMS OR RIGHTS THEREUNDER ARE NOW SO MERGED IN EVERY OTHER STATE.

Point Six.

UNDER THE LAWS OF UTAH AND THE SUMS DESCRIBED IN THE CALIFORNIA JUDGMENT ARE A MONEY JUDGMENT, ENFORCEABLE THERE BY EXECUTION.

Point Seven.

THE UTAH DECREE IS *RES JUDICATA,* NOT ONLY AS TO ALL MATTERS LITIGATED THEREIN BUT AS TO ALL MATTERS THAT COULD HAVE BEEN LITIGATED THEREIN.

ARGUMENT.

POINT ONE.

The California Court Has Refused to Rule as to Whether the Trial Court Has Failed to Give to the Decree of the Utah Court the Full Faith and Credit to Which It Was Entitled and Has Thereby Violated the Constitution of the United States.

The judgment of the Utah court, copy of which is attached to plaintiff's complaint and by reference made a part thereof [R. 60-63], discloses upon its face that the Utah court had jurisdiction over the parties and of the subject matter. Its judgment was therefore valid and it could not be impeached in the state of the forum which. in this instance, is California. This is true even though such judgment might have been unobtainable in California.

The Supreme Court of Missouri until recently thought otherwise for on July 12, 1948, through a unanimous court, it solemnly pronounced expressly to the contrary in *Union National Bank v. Lamb,* 358 Mo. 65, 213 S. W. 2d 416.

In the light of what this Honorable Court said, through Mr. Justice Douglas on May 16, 1949, speaking for a unanimous court in reversing the Missouri court, it is of more than passing interest to first note the controlling words of the Missouri Supreme Court. These are as follows:

> "In other words, a foreign judgment, original or revived, *has the same standing in Missouri, no better,*

no worse, than a domestic judgment. This does not run counter to the full faith and credit provision of the federal constitution, because, as we have seen the enforcement of a foreign judgment goes to the *remedy only and that is a matter for the law of the forum."* (Emphasis added, except as to the word "remedy.")

The foregoing Point One is fully supported by the decision of this Honorable Court in setting aside the decision of the Missouri court. We quote as follows:

"*Roche v. McDonald* is dispositive of the merits. Roche had a Washington judgment against McDonald. He brought suit on that judgment in Oregon. He obtained a judgment in Oregon at a time when the original judgment had by Washington law expired and could not be revived. Roche then sued in Washington on the Oregon judgment. The court reversed the Supreme Court of Washingotn, which had held that full faith and credit need not be given the Oregon judgment since it would have been void and of no effect if rendered in Washington. The Court held that once the court of the sister state had jurisdiction over the parties and of the subject matter *its judgment was valid and could not be impeached in the state of the forum, even though it could not have been obtained there.* That decision was in line with *Fauntleroy v. Lum,* 210 U. S. 230, 52 L. ed. 1030, 28 S. C. 641, and *Christmas v. Russell,* 5 Wall. (U. S.) 290, 18 L. ed. 475. For in those cases the *Court had held that the state of the forum could not defeat the foreign judgment*

because it was obtained by a procedure hostile to or inconsistent with that of the forum or because it was based on a cause of action which the forum itself would not have recognized.

"Any other result would defeat the aim of the Full Faith and Credit Clause and the statute enacted pursuant to it. It is when a clash of policies between two states emerges that the need of the Clause is the greatest. It and the statute which implements it are ineed designed to resolve such controversies. *Morris v. Jones,* 329 U. S. 545, 91 L. ed. 488, 67 S. Ct. 451, 168 A. L. R., *supra. There is no room for an exception,* as *Roche v. McDonald* makes plain, where the clash of policies relates to revived judgments rather than to the nature of the underlying claim as in *Fauntleroy v. Lum,* 210 U. S. 230, 52 L. ed. 1039, 28 S. Ct. 641, *supra. It is the judgment that must be given full faith and credit. In neither case can its integrity be impaired,* save for attacks on the jurisdiction of the court that rendered it." (Emphasis added.)

Union National Bank v. Lamb, 337 U. S. 38, 93 L. Ed. 1190, 69 S. C. 491.

The rule laid down there by this Honorable Court has been followed in the following cases:

1. *Johnson v. Muelberger,* 340 U. S. 581, 95 L. Ed. 552;
2. *Hughes, etc. v. Feller, et al.,* 341 U. S. 609, 95 L. Ed. 1212;

3. *Harris v. Commissioner,* 340 U. S. 106, 95 L. Ed. 111;

4. *Bank of Chicago v. United Air Lines, Inc.,* 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441.

This Honorable Court has long ago declared such violation under very similar circumstances. In determining whether the separate maintenance decree entered into in Illinois upon the stipulation of the parties was conclusive in the courts of California in a subsequent divorce action, this Honorable Court said:

> "But conceding without deciding that the California law is as asserted, the proposition of fact upon which the argument rests amounts simply to denying all effect to the Illinois decree."
>
> *Harding v. Harding,* 198 U. S. 317, 338, 49 L. Ed. 1066, 1075.

Elsewhere in its decision we note the following:

> "This being the case it follows that the Supreme Court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois Court the due faith and credit to which it was entitled and thereby violated the Constitution of the United States."
>
> *Harding v. Harding,* 198 U. S. 317, 340, 341.

POINT TWO.

The Full Faith and Credit Clause Requires the Judgments of the Courts of One State to Be Given the Same Full Faith and Credit as They Have by Law or Usage in the State Granting the Judgment, and This Requirement May Not Be Evaded by Pointing to a Previous Judgment Where the Question of Rights Under the Full Faith and Credit Clause of the Federal Constitution Was Neither Presented Nor Considered.

That the requirement is mandatory is the express holding in the following cases:

1. *Union National Bank v. Lamb,* 337 U. S. 39, 93 L. Ed. 1190, 69 S. C. 491;
2. *Bank of Chicago v. United Air Lines, Inc.,* 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441.
3. *Hughes, etc. v. Feller, et al.,* 341 U. S. 609, 95 L. Ed. 1212;
4. *Johnson v. Muelberger,* 340 U. S. 581, 95 L. Ed. 552;
5. *Riley v. New York Trust Co.,* 315 U. S. 343, 348, 86 L. Ed. 885, 891.

This mandatory requirement may not be evaded by a state court by alleging a non-existent holding by it in a previous action between the same parties.

In its opinion, the District Court of Appeal refers to its earlier decision in *Howarth v. Howarth* (1947), 81 Cal. App. 2d 266, 183 P. 2d 670, and bases its refusal to pass upon the question squarely presented, as to whether the trial court here failed to give full faith and

credit to the Utah judgment, upon the following erroneous recitals:

> 1. "An examination of the previous opinion of this court and appellant's brief herein, discloses that appellant's attack upon the judgment appealed from is based upon the identical grounds assigned upon his appeal from the judgment in the previous action, and all of which are decided adversely to him by the court." [R. 128.]
>
> 2. ". . . appellant's primary contention is that the agreement sued upon was incorporated and merged in the [fol. 129] decree granted by the District Court in and for Tooele County, Utah, in the divorce action between the parties, and as corollary thereto (a) that the payments under said agreement were in the nature of alimony and hence subject to modification by the Utah court, and (b) *any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the federal Constitution.* In the previous action between the parties heretofore adverted to, the Superior Court in and for the County of Los Angeles decided each of these contentions adversely to appellant, and as stated, upon appeal this judgment was affirmed. Hence appellant is estopped from relitigating the same questions in the instant proceeding." (Emphasis added.) [R. 128-129.]

Ignored by the District Court of Appeal is the fact the rights of petitioner under the Full Faith and Credit Clause of the Federal Constitution were never put in issue in the first *Howarth* case and were never considered or passed upon by either the said Superior Court or by the District Court of Appeal. The only reference to the Federal Constitution in the earlier case was that peti-

tioner, for the first time in the case, asserted upon appeal his rights under the Fourteenth Amendment to the Constitution of the United States.

And, as shown by the opinion of the District Court of Appeal, no other rights under the Federal Constitution were considered or passed upon. We quote as follows:

> "Appellant's contention that he may not be deprived of his right to have the support provisions of the Utah court decree modified without denying to him the rights guaranteed him by the provisions of section 13, Article I of the Constitution of the State of California *and by subdivision 1 of the Fourteenth Amendment to the Constitution of the United States* cannot be sustained." (Emphasis added.)
>
> *Howarth v. Howarth* (1947), 81 Cal. App. 2d 266, 183 P. 2d 670.

Here, at the outset, petitioner raised in the trial court the question of his rights under the Full Faith and Credit Clause of the Federal Constitution. This was done by demurrer to plaintiff's complaint and by demurrer to plaintiff's first amended complaint [R. 5-8, 10-15, 29-34].

Petitioner, by said demurrers, not only asserted his rights under the Constitution and Laws of Utah as to modification of the support provisions of the Utah judgment, but also insisted that the action brought in California, not upon the Utah judgment but upon the property settlement agreement which, under Utah law had become merged in said judgment and had no longer an independent existence and which could not be sustained as . . . any judgment rendered (herein) attempting to do so will violate the provisions of Article IV, section 1, of the Constitution of the United States . . ." [R. 12].

Petitioner's demurrer having been overruled, he filed his answer to plaintiff's first amended complaint, wherein he expressly alleged that, it being conceded by all parties that the Utah court had jurisdiction of the parties and the subject matter ". . . neither the courts of California, nor of any other State of the United States may impeach the said Utah decree, nor determine, under the law of the forum, the construction or effect of the said Utah decree, nor impair its integrity by failing to give it Full Faith and Credit, without violating the provisions of Article IV, section 1, of the Constitution of the United States." [R. 37, 39, 40.]

Through the trial in the Superior Court, petitioner continued to assert his said rights.

The attention of the District Court of Appeal, in petitioner's opening brief in the present case, was expressly directed to the fact that following the trial, the trial court made its written findings of fact and conclusions of law which included the following:

> *"That throughout the proceeding in the above entitled Court the defendant has tendered for decision his rights under the Federal Constitution and Laws and under the Constitution and laws of the State of Utah and under the Constitution and laws of the State of California, and they have been duly considered by the above entitled Court and decided adversely to the contentions of said defendant."* (Emphasis added.) [R. 110.]

Notwithstanding the fact that, as so stated by the trial court, it did consider the rights tendered for decision under the Full Faith and Credit Clause of the Federal Constitution, and had decided "adversely" to the contentions of petitioner, the District Court of Appeal refused

to consider upon appeal, or to rule upon the question squarely before it, namely, whether the trial court had denied the full faith and credit to which the Utah judgment was entitled under the rule laid down in *Union National Bank v. Lamb*, 337 U. S. 38, 93 L. Ed. 1190, and other authorities herein referred to.

POINT THREE.

The California District Court of Appeal Has Erroneously Held That Petitioner's Contention That ". . . Any Attempt by a California Court to Enforce Payment Thereof Constitutes a Violation of the Full Faith and Credit Clause of the Federal Constitution," Could Not Be Considered and That Petitioner Was "Estopped" [R. 129] to Have It Considered Because "in the Previous Action Between the Parties . . . the Superior Court . . . Decided Each of These Contentions Adversely to Appellant, and as Stated Upon Appeal This Judgment Was Affirmed," Whereas No Such Question Under the Full Faith and Credit Clause Was Ever Presented to or Ruled Upon by Said Superior Court in Said Previous Action.

Petitioner obviously cannot be estopped to have determined the federal question under the Full Faith and Credit Clause so directly passed upon by the trial court by reliance by the District Court of Appeal upon its previous decision in a case where such rights were neither presented for decision, considered by, nor passed upon by it or by the trial court.

California granted the present case a forum. The trial court made an express adjudication of the rights of the parties under Article IV, Section 1, of the Constitution of the United States. In doing so, the trial court has

construed the Utah judgment by applying California law rather than Utah law and has thereby denied the said judgment the full faith and credit to which it is entitled under the Federal Constitution.

In the concurring opinion of Mr. Justice Jackson in *First National Bank of Chicago v. United Air Lines, Inc.*, 342 U. S. 396, 72 S. Ct. 421, 96 L. Ed. 441, he declared his belief to be that the state was free to refuse the case a forum, ". . . but if it undertook to adjudicate the rights of the parties, the Constitution would require it to apply the law of Utah . . ."

POINT FOUR.

Claims Under the "Property Settlement and Separation Agreement" May Not Be Relitigated in California Without Violating the Provisions of the Constitution of the United States.

This Honorable Court has said:

> "The full faith and credit to which a judgment is entitled is the credit which it has in the state from which it was taken, not the credit that under other circumstances it might have had."
>
> *Morris v. Jones*, 329 U. S. 545, 91 L. Ed. 488, 67 S. Ct. 451, 168 A. L. R.

Speaking of a final judgment, the court said:

> "That determination is final and conclusive in all courts for the Full Faith and Credit Clause established 'through the federal system the sanitary principle of the common law that a litigation once pursued to judgment shall be conclusive of the rights of the parties in every other court as in that where the judgment was rendered.' *Id.* p. 439. And see *Riley v. New York Trust Co.*, 315 U. S. 343, 348, 349, 86

L. ed. 885, 890, 891, 62 S. Ct. 608. *The nature* and amount *of petitioner's claim may not thereafter be challenged or retried* in the Illinois proceedings." (Emphasis added.)

Morris v. Jones, 329 U. S. 454, 91 L. Ed. 488, 67 S. Ct. 451.

A further reason for the rule was given in *Riley v. New York Trust Co.,* 315 U. S. 343, 348, 349, 86 L. Ed. 885, 891, from which case we now quote as follows:

"Were it not for this full faith and credit provision, so far and the Constitution controls the matter, adversaries could again wage their legal battles whenever they met in other jurisdictions."

POINT FIVE.

The "Property Settlement and Separation Agreement" Merged in the Utah Decree and All Claims or Rights Thereunder Are Now Merged in Every Other State.

In *Bates v. Bodie,* 245 U. S. 520, 62 L. Ed. 444, it was held that the divorce decree, which provided for alimony as set forth in a consent agreement of the parties, and "the findings" of the Arkansas court were entitled to full faith and credit in the courts of Nebraska and constituted a full and complete bar to plaintiff's right to recover additional alimony under the laws of the State of Nebraska.

Mr. Justice McKenna, speaking for the court, said, at page 525:

"The case is not in broad compass and depends upon the application of the quite familiar principle that determines the estoppel of judgments, *and the principle would seem to have special application to a judgment for divorce and alimony. . They are usually concomitants in the same suit,—some cases say must*

be,—or rather, that alimony is an incident of divorce, *it must be awarded by the same decree that grants the separation. And it is the purpose* to unite them, *as alimony necessarily depends upon a variety of circumstances more adequately determined in the suit for divorce,* not only the right to it, *but the measure of it*—all circumstances upon which it depends then naturally brought under the view and judgment of the Court. Whether, however, the right to it should be litigated in the suit for divorce or may be sought subsequently in another, the principle is applicable *that what is once* adjudged cannot be tried again." (Emphasis added.)

Bates v. Bodie, 245 U. S. 520, 525, 62 L. Ed. 444, 449.

The point made here is fully sustained also by the declaration made by this Honorable Court in *Magnolia Petroleum Co. v. Hunt,* 320 U. S. 430, 88 L. Ed. 149, quoted as follows:

". . . so that a cause of action merged in a judgment in one state is likewise merged in every other."

As to the presentation of property settlement and separation agreements to courts in divorce proceedings for adjudication, the rule is well stated in *Holloway v. Holloway,* 130 Ohio St. 214, 198 N. E. 579, where the court found that the obligation for support allowances was on the decree and not upon the agreement providing for same following the presentation of the agreement to the court

in the divorce proceedings for determination. We quote therefrom, starting at page 580:

> "A decree is valid as such regardless upon what it may be grounded. *There is nothing in the law to render a decree invalid or ineffectual merely because it was predicated upon an agreement of separation, which agreement is incorporated bodily in the decree. A decree which incorporates an agreement is a decree of court nevertheless* and as soon as incorporated into the decree *the separation agreement is superseded by the decree and the obligations imposed are not those imposed by contract but are those imposed by decree and enforceable as such. Once the contract is merged into the decree, the value attached to the separation agreement is only historical.*" (Emphasis added.)

POINT SIX.

Under the Laws of Utah the Sums Described in the California Judgment Are a Money Judgment Enforceable as Such in Utah by Execution.

Utah has expressly so held. We quote the words of its Supreme Court:

> "By weight of authority, and we think the better reason, although there are cases to the contrary, *a decree for alimony,* in a gross sum *as well as to past due and unpaid installments stands upon the same footing as ordinary money judgments and may be enforced by execution* in the same manner as ordinary money judgments may be enforced."
>
> *Beesley v. Badger,* 66 Utah 194, 199.

POINT SEVEN.

The Utah Decree Is Res Adjudicata Not Only as to All Matters Litigated Therein But as to All Matters That Could Have Been Litigated Therein.

This Honorable Court has so held upon facts very similar to the facts here.

Bates v. Bodie, 245 U. S. 520, 62 L. Ed. 444.

Conclusion.

For the reasons stated, it is clear that the courts of the State of California have failed to give to the divorce decree obtained by your petitioner in Utah the full faith and credit required by the provisions of Article IV, Section 1, of the Constitution of the United States and that this case presents highly important problems with respect to the application of the Full Faith and Credit Clause. The holding made by this Honorable Court in *Union National Bank v. Lamb,* 337 U. S. 38, 93 L. Ed. 790, that "it is the *judgment* (emphasis added) that must be given full faith and credit. In neither case can its integrity be impaired, save for attacks on the jurisdiction of the court that rendered it," would appear to be fully applicable to the facts here and calls for here, as there, the exercise of the supervisory control of this Honorable Court.

It is respectfully submitted that, not only in the interest of the general welfare but in order that the will of the people of the United States, as set forth in the Constitution, be not only observed but respected and obeyed, that

an authoritative ruling from this Honorable Court is necessary and that a writ of certiorari should be granted in order that this Honorabl Court might review the judgment of the District Court of Appeal of the State of California, Second District, Division One, and reverse such judgment.

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